IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 3, 2009

STATE OF TENNESSEE v. CARL ALLEN FARRIS

Direct Appeal from the Circuit Court for Bedford County
No. 16370 and 16371 Lee Russell, Judge

No. M2008-01631-CCA-R3-CD - Filed July 29, 2009

Defendant-Appellant, Carl Allen Farris ("Farris"), pled guilty to two counts of driving under the influence, fifth offense, and two counts of driving on a revoked license, seventh offense, with the length and manner of service of the sentence to be determined by the trial court. The trial court sentenced Farris as a Range II, multiple offender to an effective term of seven years in the Tennessee Department of Correction. On appeal, Farris contends the sentences imposed by the trial court for the driving under the influence convictions are excessive. Following our review, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and J. C. MCLIN, JJ., joined.

Donna Orr Hargrove, District Public Defender; Michael J. Collins, Assistant Public Defender, Shelbyville, Tennessee, for the defendant-appellant, Carl Allen Farris.

Robert E. Cooper, Jr., Attorney General and Reporter; David H. Findley, Assistant Attorney General; Charles F. Crawford, Jr., District Attorney General; and Michael D. Randles, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

Guilty Plea Hearing. On January 18, 2008, in case number 16370, Farris pled guilty to driving under the influence, fifth offense, and driving on a revoked license, seventh offense. In case number 16371, Farris also pled guilty to driving under the influence, fifth offense, and driving on a revoked license, seventh offense. At the guilty plea hearing, the State provided the following summation of facts in support of Farris' convictions:

In case No. [16370], those events occurred on April 24, 2007. Officer Matt Griffy [phonetic][1] was headed - - I don't know the compass direction - - but he was on Lane Parkway coming, I guess, inbound towards the police department. [Farris] was on West Lane Street and actually turned from West Lane Street left onto Lane Parkway. The problem is as [Farris] did this, he crossed the path of Officer Matt Griffy, Griffy's vehicle and another civilian motorist. Officer Griffy had to brake very hard, almost to the point of slamming on his brakes to avoid a collision and it appeared [that] the other citizen's vehicle had to do the same thing. So, of course, Officer Griffy immediately U-turned and went in the direction of the vehicle that had just crossed his path. It was an Isuzu Rodeo vehicle. [The vehicle] pulled into the church parking lot in front of the ball fields just past, I believe, Dairy Queen and where the old gas company building was. [The vehicle] actually, I think, even went over the curb in the process of pulling in that parking lot.

Officer Griffy approached the driver and was, in fact, [Farris]. However, when Officer Griffy asked [Farris] for identification, [Farris] said he did not have any on his person, and he gave his name as Joel J. Rohane . . . and gave a date of birth of 10/17/1973.

. . . .

And Mr. Rohane, that's his date of birth and he has a valid driver's license.

The officer could detect that [Farris] had been drinking. [The officer] could smell it. And in [Farris'] mannerisms, [the officer] could detect it. [The officer] asked [Farris] if he had been drinking and [Farris] told him initially a sum of about two to four beers. However, as the conversation went on, it actually elevated up to at least six beers that [Farris] had consumed prior to getting behind the wheel.

The officer had [Farris] perform some field sobriety tests, and overall the [officer] felt that [Farris] did poorly on those and further that indicated that he was intoxicated. Ultimately, [the officer] put [Farris] in a position to pat him down to arrest him for driving under the influence and it was at that point the officer discovered a wallet in [Farris'] front pant pocket. [The officer] removed it and asked [Farris], "I thought you said you didn't have any identification."

The defendant said, " Well that's just a wallet."

And then the officer said, "So I'm not going to find any identification in here."

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[1] The transcript denotes that the name "Griffy" was phonetically spelled.

And the defendant said, "No[.]"

. . . .

In fact, [the officer] found Carl Farris' Tennessee identification card in there.

[Farris] was asked to give a test to show his alcohol content and he refused to give that test and, of course, he was - - his driver's license, Carl Farris' driver's license, was revoked.

In case No. [16371], those events occurred on August 30, 2007. They principally involved Officer Rod Stacey [phonetic][2] of the police department. [Officer Stacey] was assisting the drug task force in making a traffic stop when they observed a black Isuzu. It turns out it's the exact same vehicle being driven at a high rate of speed and in a very reckless manner. I think Officer Stacey actually attempted to make a stop basically standing on the side of the road, was not successful in doing that so he went in pursuit and ultimately stopped the defendant at a car wash on Colorado Boulevard.

[Officer Stacey] made contact with the driver and it was [Farris]. [Officer Stacey] asked [Farris] for identification and [Farris] indicated that he had lost it down at the river and didn't have any identification. And [Farris] gave his name as Joel John Rohane, the same name and, again, gave that date of birth.

The officer could, of course, detect [that Farris] had been drinking. [The officer] could smell alcohol on [Farris], [Farris'] speech was slurred. [Farris] appeared to be rather unsteady. And when [Farris] was talking with Officer Stacey, he was rather animated; in other words, he tended to use his arms a lot and gesture and, again all that indicated to the officer that he was under the influence. [The officer] asked [Farris] to perform some field sobriety tests, which [Farris] did poorly on. [Farris] was asked to submit to a blood alcohol test and he refused, and, of course, his license was still revoked on that day.

Sentencing Hearing. On March 28, 2008, the trial court conducted a sentencing hearing. At the hearing, the pre-sentence report was entered into evidence without objection. The report reflected that Farris was thirty-two years old and had been convicted of four felonies including possession of schedule II, schedule IV, and schedule VI drugs. In addition, Farris had been convicted three times for driving under the influence,[3] six times for driving on a revoked license,[4]

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[2] The transcript denotes that the name "Stacey" was phonetically spelled .

[3] Unlike the pre-sentence report, Farris' indictment lists four prior convictions for driving under the influence which denotes that the instant charges would constitute his fourth or subsequent offense. See T.C.A. § 55-10-
(continued...)

and once for failure to appear. Each of Farris' felony offenses were committed at different times but Farris was convicted for each on the same day. The pre-sentence report detailed the following regarding Farris' compliance with his felony sentences:

> The Defendant was sentenced to a total of 6 years TDOC . . . on October 14, 1994[,] in Rutherford Co. Circuit Court Case #31236 and #30772A. He was released to probation for the balance of his sentence on February 3, 1995. Farris absconded from supervision on May 8, 1996. He was revoked in absentia on May 17, 1999. Farris was apprehended and placed in custody on April 23, 2000[.] He was granted a judicial release back to probation on December 5, 2000. Farris absconded from supervision on March 5, 2002[.] He was apprehended and this probation was revoked in full on June 24, 2002. Farris was paroled on July 14, 2003. His parole was revoked for new criminal conduct and positive drug screens on July 28, 2004. He flattened this sentence on June 27, 2005.

In addition, Farris had outstanding probation violation warrants in Coffee County and Davidson County.

The report also included unverified arrests from Blount County and Williamson County. In Blount County, Farris was arrested for driving on revoked license, third offense, and felony possession of cocaine. In Williamson County, he was arrested for resisting arrest, criminal impersonation, and driving on a revoked license.

Farris testified on his own behalf at the hearing. Farris contested the unverified arrests from Blount County. He stated that he has never been to Blount County and the charges are not related to him. Farris stated that all of his felony convictions were obtained at the age of eighteen. Farris admitted to having a problem with alcohol for "[q]uite a few years." He stated, "Sometimes I go without drinking for a . . . long time. Sometimes I drink a lot." Farris stated that he understood that he endangers others when he drives after drinking and that he "feel[s] bad about it." On cross-examination, Farris acknowledged that he was on bond for the April 2007 driving under the influence arrest when he was arrested again for driving under the influence in August of 2007. Farris also acknowledged that he was on probation at the time he committed the instant offenses. On redirect-examination, Farris testified that he had requested that his probation officer arrange inpatient rehabilitation for him after his last conviction for driving under the influence in Davidson County but he was arrested for the instant charge before he started the rehabilitation.

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[3](...continued)
403(a)(1)(A)(vi) (2006). Additionally, some of the prior convictions listed in the indictment are not identical to those listed in the pre-sentence report.

[4] Some of the prior convictions for driving on a revoked a license listed in Farris' indictment, denoting that this is Farris second or subsequent offense, are not identical to those listed in the pre-sentence report. See T.C.A. 55-50-504(a)(2) (2006).

At the conclusion of the hearing, the trial court imposed concurrent sentences of three years, six months for the driving under the influence conviction and ten months for the driving on a revoked license conviction in case number 16370. The trial court also imposed concurrent sentences of three years, six months for the driving under the influence conviction and ten months for the driving on a revoked license conviction in case number 16371. Because Farris was out on bond when he committed the offenses in case number 16371, the trial court ordered mandatory consecutive sentences in case numbers 16370 and 16371, for a total effective sentence of seven years. See T.C.A. 40-20-111(b) (2006); Tenn. R. Crim. P. 32(c)(3)(c). A timely notice of appeal was filed.

ANALYSIS

Farris argues that the sentences imposed by the trial court for the driving under the influence convictions are "excessive and contrary to law." Specifically, he contends that the weight given to the enhancement factors used by the trial court "did not comply with the 'purposes and principles' of the [Sentencing Act]." In response, the State contends that "the weight afforded applicable enhancement factors may not be reviewed on appeal." We agree with the State.

On appeal, we must review issues regarding the length and manner of service of a sentence de novo with a presumption that the trial court's determinations are correct. T.C.A. § 40-35-401(d) (2006). Nevertheless, "the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). Our review is de novo, without a presumption of correctness, if the trial court applied inappropriate mitigating or enhancement factors or otherwise failed to follow the principles of the Sentencing Act. State v. Carter, 254 S.W.3d 335, 345 (Tenn. 2008). The defendant, not the State, has the burden of showing the impropriety of the sentence. T.C.A. § 40-35-401(d) (2006), Sentencing Commission Comments.

Before a trial court imposes a sentence upon a convicted criminal defendant, it must consider: (1) the evidence adduced at the trial and the sentencing hearing; (2) the pre-sentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; (6) any statistical information provided by the administrative office of the courts as to Tennessee sentencing practices for similar offenses; and (7) any statement the defendant wishes to make in the defendant's own behalf about sentencing. See T.C.A. § 40-35-210(b); see also State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002); State v. Osborne, 251 S.W.3d 1, 24 (Tenn. Crim. App. 2007).

The Tennessee Supreme Court has stated that the 2005 Amendments to the Sentencing Act "deleted as grounds for appeal a claim that the trial court did not weigh properly the enhancement and mitigating factors." Carter, 254 S.W.3d at 344. In sentencing a defendant, the trial court must

consider the sentencing guideline that suggests an adjustment to the defendant's sentence when enhancement or mitigating factors are present; however, these factors under the guideline are merely advisory rather than binding upon a trial court's sentencing decision. Id.; see also T.C.A. § 40-35-210 (2006). The weight given to each enhancement or mitigating factor is left to the sound discretion of the trial court. Id. Thus, this court is "bound by a trial court's decision as to the length of the sentence imposed so long as it is imposed in a manner consistent with the purposes and principles set out in sections -102 and -103 of the Sentencing Act." Id. at 346.

The trial court imposed a three year, six month sentence upon Farris for each conviction of driving under the influence, fifth offense. Driving under the influence, fourth or subsequent conviction, constitutes a Class E felony. T.C.A. § 55-10-403(a)(1)(A)(vi) (2006). As a Range II, multiple offender, a defendant is subject to a sentence of two to four years for a Class E offense. T.C.A. § 40-35-112(b)(5) (2006). The trial court applied the following enhancement factors:

> (1) the defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range.
> (8) the defendant failed to comply with the conditions of a sentence involving release into the community.
> (13)(C) the defendant was on probation when he committed the offenses.

T.C.A. § 40-35-114(1), (8), (13)(C) (2006). The trial court did not apply any mitigating factors.

In the trial court's application of the enhancement factors, the trial court found the following:

> So, having established the range, and as I understood [defense counsel] a minute ago, there's not even any contest about that. We ask ourselves and begin with the minimum within the range, and we're to ask ourselves whether they're any enhancing factors present under 40-35-114. Obviously, the first one is present, that's a previous history of criminal convictions of behavior. We have two felony convictions in addition to those necessary to establish the range, so certainly they are considered, that would be the December the 16th, 1993, schedule six and April 22nd, 1994, conviction for schedule[] two cocaine less than half a gram.
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> So, those are certainly part of the enhancement here. Also, we have misdemeanor convictions, for instance, a failure to appear that's listed in Ms. Prosser's[5] report at the top of page 9, and that occurred in 2000 in a rather lengthy period of time after his problems in 1993 and [19]94. We're aware that he has had driving on revoked and DUIs spread across the entire time period, but it does appear to me that factor one is very much present in this case.

[5] Ms. Prosser is the investigating officer who prepared the pre-sentence report.

> Likewise, factor eight is present, he has on multiple occasions failed to meet the terms of his release into the public. I would point out to you the conviction on page 6 of the [pre-sentence] report for DUI, which resulted in a revocation. He also had revocations in other cases that are listed on the [pre-sentence] report.
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> Just to give a few examples, I'll refer your attention to page 10, where the felony schedule two committed on April the 22nd, 1994, he had a revocation, he had a revocation of the conviction that was for schedule four on December 13th, 1993, still on page 10, so he has had a multitude of revocation. So, that factor is certainly present. Also present is factor number 13. He was on probation at the time that he committed both of these offenses, double probation on one of them, which is a singular case of probation for 16371.
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> So, factor 13 is present in a very dramatic way. As to factor number ten, I think that's present, but I'm not going to give that a great deal of weight in this particular situation, in part because the other three factors are here and . . . dramatically present.

Farris does not challenge the applicability of the enhancement factors used by the trial court; instead, he challenges the weight the trial court afforded to those enhancement factors. As previously mentioned, this is no longer grounds for an appeal. Carter, 254 S.W.3d at 344. The record indicates that the trial court considered the applicable sentencing principles. In sentencing Farris, the trial court noted its factual findings regarding Farris' criminal history and past failures in adhering to conditions of probation. In addition, Farris was on probation for the same offenses for which he was convicted. As a Range II offender, the trial court set Farris' felony sentences within the statutorily prescribed range. See T.C.A. § 40-35-112(b)(5). Thus, we cannot conclude that the sentences imposed are excessive or inconsistent with the purposes and principles of our sentencing laws. Accordingly, Farris is not entitled to relief.

CONCLUSION

Based on the foregoing reasons, we affirm the judgments of the trial court.

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CAMILLE R. McMULLEN, JUDGE